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July 25, 2013



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P. O. Box 110
Isle of Wight, VA 23397

Re: Removal Petition for Byron "Buzz" Bailey, Newport District Supervisor,
Isle of Wight County Board of Supervisors, Case No. CL13-614

Dear Ms. Jones:

Please find attached a Motion for Nonsuit, and attached Suffolk Commonwealth's Attorney's Investigative Report, which we request you file in the above-styled matter in the Isle of Wight Circuit Court.

Sincerely,

Susan H. Walton
Senior Assistant Commonwealth's Attorney

SHW/gbt
Enclosure
cc: H. Woodrow Crook, Esquire

IN THE CIRCUIT COURT FOR THE COUNTY OF ISLE OF WIGHT

COMMONWEALTH OF VIRGINIA,
PLAINTIFF,

v.

Case No.: CL 13-614

BYRON "BUZZ" BAILEY,
DEFENDANT.

MOTION FOR NONSUIT

Comes now the Plaintiff, the Commonwealth of Virginia, by counsel, and respectfully moves this Court for leave to take a nonsuit in this action for the reasons stated in the attached Suffolk Commonwealth's Attorney's Investigative Report, and as grounds therefore says as follows:

1. On June 28, 2013, a removal petition was filed in this Court against Byron "Buzz" Bailey, defendant.
2. Defendant has not filed a counterclaim, cross-claim or third party claim to said complaint.
3. This action has not been previously nonsuited.

WHEREFORE, the Commonwealth respectfully moves this Court to nonsuit this action.

Respectfully submitted,


C. Phillips Ferguson
Commonwealth's Attorney


Susan Walton
Assistant Commonwealth's Attorney

CERTIFICATE OF NOTICE

I, Susan H. Walton, Assistant Commonwealth's Attorney for the City of Suffolk, hereby certify that a true copy of the foregoing Motion to Nonsuit, was mailed and emailed this 25th day of July 2013, to H. Woodrow Crook, Jr., H. Woodrow Crook, P.C., 229 East Main Street, Smithfield, Virginia, 23430, and jbcrook@yahoo.com.


Susan Walton

IN THE CIRCUIT COURT FOR THE COUNTY OF ISLE OF WIGHT

COMMONWEALTH OF VIRGINIA,

PLAINTIFF,

v.

Case No.: CL 13-614

BYRON "BUZZ" BAILEY,

DEFENDANT.

SUFFOLK COMMONWEALTH'S ATTORNEY'S
INVESTIGATIVE REPORT

I. SUMMARY OF FACTS:

Byron "Buzz" Bailey, (Bailey) was elected to the Isle Wight County Board of Supervisors in November 2011, to represent the Newport District as their Supervisor. He received 1178 votes from the combined Bartlett and Carrollton precincts. A total of 2350 votes were cast in this election for the office that Bailey holds. Mr. Bailey began his duties as a member of the Board of Supervisors effective January 1, 2012.

On June 28, 2013, a Removal Petition (Petition) was filed against Bailey and on that same day Isle of Wight County Circuit Court Judge Carl E. Eason issued a Rule to Show Cause why Byron "Buzz" Bailey should not be removed from the office of Newport District Supervisor of the Board of Supervisors for Isle of Wight County. The Petition was signed by 301 individuals. The Isle of Wight County Registrar's Office established that 249 of those individuals were confirmed registered voters in the Newport District, without any questions or issues. This number meets the statutory minimum requirement for the removal petition.

The Petition and subsequent Order alleged that pursuant to Virginia Code §24.2-233, Bailey should be removed from office as a member of the Board of Supervisors for neglect of duty, misuse of office and/or incompetence in the performance of his duties, which has a material adverse effect upon the conduct of the office of the Newport District Supervisor.

The removal petition is based on a remark made by Bailey at a Board of Supervisors meeting and four controversial emails. It has been confirmed that on May 13, 2013, at a Board of Supervisors meeting, Bailey made the following remarks regarding the lack of funds to support the budgetary requests from the School Board:

“I guess if we could be like Washington, can we print some money in Isle of Wight County? Save your confederate money, the South will rise again.”

In addition, on Tuesday, October 30, 2012; Sunday, November 11, 2012; Tuesday, March 26, 2013; and Thursday, March 14, 2013, Bailey forwarded an email from his personal email account, to at least twenty-seven other email addresses. Most of those recipients were personal acquaintances of Bailey, one was the editor of the Smithfield Times. The following government employees, elected officials, or public figures, all of whom are Caucasian, also received the emails; Al Casteen – Board of Supervisors, Rex Alphin – Board of Supervisors, Dee Dee Darden – Board of Supervisors, Joann Hall – Board of Supervisors, Edward Wrightson – Director of General Services, Mark Popovich – County Attorney, Cary Mills Storm – County Administrator’s Secretary/Clerk to Board of Supervisors, Doug Caskey – County Administrator, and Constance Roads – Director of the Chamber of Commerce. Some of these emails went to private email addresses while others went to the County email addresses. All of the County email addresses are easily accessible by the public.

The four controversial emails can be summarized as follows: The October 30, 2012, email commentary stated, “That just about sums it up, buzz”. The forwarded email depicted President Obama and the First Lady standing side by side. The Caption reads “An embassy was bombed” No shit! Muslims okay?”. [sic]

The November 11, 2012, email commentary stated, “this is just too funny”. The actual forwarded email stated, “CAN YOU GUESS....WHAT THIS IS...?? YOU GUESSED RIGHT! MICHELLE OBAMA’S HIGH SCHOOL REUNION !!!!!!! There is an attached picture with a large group of what appear to be African women, topless and wearing tribal dress.

The March 26, 2013, email commentary declared, “Sad but true Herb. Buzz”. The actual forwarded email read “Advice for old guys working out! Ernie was working out at the gym when he spotted a sweet young thing walking in He asked the trainer, ‘What machine should I use to impress that young lady over there?’ The trainer looked me over and said, “I would recommend the ATM in the lobby.” There is an attached picture of an elderly man working out in a gym and an attached picture of a younger woman wearing a bikini.

The March 14, 2013, email commentary stated “Coming from a retired Navy Capt this is wild....the ‘tanker’ oughta’ lock and load a saluting round, crank it off to see how much faster the depicted individual could go...” The actual forwarded email read: “Check this out... Keeping you up to date: Playboy magazine reportedly offered Sarah Palin \$4,000,000 to pose nude in an upcoming issue. Michelle Obama

was offered \$50 by National Geographic. In other news we all remember when KFC offered a 'Hillary' meal, consisting of two small breasts and two large thighs. Now KFC is offering the 'Obama Cabinet Bucket.' It consists of nothing but left wings and chicken shit." The email goes on to read, "Just keeping you up to date.... I heard the President's visit to the troops didn't go so well.. Oh yes, you are going to forward this, aren't you!" There is an attached picture of President Obama riding a tricycle and crying with two tanks chasing him.

Bailey admitted that he sent the controversial emails. He further apologized for his actions. In his letter of apology he described his actions as "hurtful". Bailey also stated that he is not very good with computers and forwarded all of the emails, mistakenly to some of the recipients. Additionally, he indicated that he erroneously hit "reply all" on his computer. It was also discovered that many of the public employees who received the "controversial" emails, also mistakenly received emails regarding personal information concerning Bailey's family members.

Bailey signed an Isle of Wight County Computer Network Acceptable Use Policy (Policy) form before taking office, on December 15, 2011, acknowledging that he read the Policy. Section 1.5 of that Policy states that a "[v]iolation of the above policies may result in all loss of system access as well as other disciplinary and/or legal action by the County of Isle of Wight". According to Isle of Wight County's Director of Human Resources, no one has filed a complaint with the County alleging that Bailey has violated the Computer Network Acceptable Use Policy and thus no County action has been taken regarding his possible violations of this directive. According to the Isle of Wight County Attorney, although the members of the Board of Supervisors sign the form, they are elected officials and are not subject to the Policy. Bailey was issued a County email address but was not given a County computer.

One member of the Board of Supervisors, Joann Hall, contacted the County Attorney, Mark Popovich in November, and indicated that she did not approve of the emails being sent to her email account. Based on this conversation, Joann Hall asked Al Casteen, then Chairman of the Board of Supervisors, to ask Bailey to stop sending any emails that were not work related to her email address. Mr. Casteen has subsequently indicated that he did not forward Hall's request to Bailey to stop sending the emails. Board member Rex Alphin also spoke with Mark Popovich, the County Attorney, regarding the emails and was told that he could request Bailey to remove him from his email list, which he did.

Many of the other employees and officials who received the controversial emails indicated that they did not appreciate receiving them and variously described

them as being “unprofessional”, “offensive”, “inappropriate”, “political”, “insensitive” “egregious”, “disenfranchising”, and “hurtful”. None of the other public officials or individuals who received the emails filed a complaint with their direct supervisor, or personally requested Bailey to cease and desist any further dissemination of these “non-work related emails” to their computers.

Isle of Wight County has a Non-Discrimination and Anti-harassment Policy that applies to all persons working for and with Isle of Wight County, regardless of employment status. The Policy requires “Individuals who believe they have experienced conduct that they believe is contrary to this policy or who have concerns about such matters should make their complaints with the Director of Human Resources, Assistant County Administrator, County Administrator, or County Attorney”. According to the County’s Director of Human Resources, no one has filed a formal complaint with the County’s Human Resources Department alleging that Bailey has violated this policy and thus no action has been taken by the County regarding any possible violations. Moreover, the members of the Board of Supervisors would not be subject to any disciplinary action under this policy.

More than a dozen County employees and officials have been interviewed, including all of the members of the Board of Supervisors, the Director of Commerce for Smithfield, the Commissioner of the Revenue for Isle of Wight, and a representative from the Department of Economic Development. Most of them agree that the publicity surrounding Bailey’s actions has given the County “unwanted attention”, has “disenfranchised many citizens”, is a distraction and has “caused major disruption in the office”. However, not one person indicated that they have seen any discernible economic impact the County has suffered as a result of Bailey’s actions.

In addition, there has been no evidence to indicate that Bailey has used his position as a member of the Board of Supervisors to personally develop or obtain any type of economic or personal gain, profit, or advantage for himself or anyone else.

Upon review of all the available minutes (through March 18, 2013) and the archived video footage from the meetings of the Board of Supervisors since Bailey took office in 2012, it appears he has attended all but one of the Board of Supervisors meetings. The meeting minutes, as best determined, have revealed that there have been 521 votes cast. Bailey has cast a vote in all of the 521 instances, except two which were ministerial in nature. Of the 521 votes tallied: 497 were unanimous 5-0, eight were 4-1, eight were 3-2, and there were eight votes in which supervisors abstained. Throughout Bailey’s tenure, he has continued to serve on all of the Board of Supervisors Committees to which he was appointed.

II. STATUTORY CONSTRUCTION AND CASE ANALYSIS:

Virginia Code § 24.2-233 creates the Circuit Court's power to remove a public officer from office. Such proceedings are "quasi criminal" and "although not a criminal case is one highly penal in its nature, and one in which the Commonwealth is the party plaintiff." Warren v. Commonwealth, 136 Va. 573, 594, 118 S.E. 125, 131 (1923). The Virginia Supreme Court has held that because "a proceeding to remove a public officer [is] 'highly penal in nature' ... the statute must be strictly construed." Davis v. Malbon, 195 Va. 368, 375, 195 Va. 368 (1953).

Because the Commonwealth is the moving party in a removal action, the "burden [is] upon the Commonwealth to prove by clear and convincing evidence that the defendant [is] guilty of one or more of the charges enumerated in the statute, and set forth in the complaint." Id. at 379. "The Commonwealth's Attorney's duty is to further the best interest of the Commonwealth, not the interests of the respective petitioners." Johnson v. Woodard, 281 Va. 403, 707 S.E. 2d 325, 329 (2011).

The Bailey removal petition relies on Virginia Code § 24.2-233, subsection 1, which reads in pertinent part:

Upon petition, a circuit court may remove from office any elected officer..., residing within the jurisdiction of the court:

For neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office. . . .

Thus, the conduct complained of must have:

(1) Constituted;

(A) Neglect of duty, and/or

(B) Misuse of office, and/or

(C) Incompetence in the performance of [his] duties; AND

(2) Must have had a material adverse effect upon the conduct of the office.

Virginia Courts offer absolutely no guidance when interpreting the meaning of these terms under Virginia Code § 24.2-233. "Although any ambiguity or reasonable doubt as to the proper construction of a penal statute must be resolved in favor of the

accused, a defendant is not entitled to benefit from an "unreasonably restrictive interpretation of the statute." Holloman v. Commonwealth, 221 Va. 196, 198, 269 S.E.2d 356, 357 (1980) (quoting Ansell v. Commonwealth, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979)).

1. (A) Neglect of Duty

There is no statutory definition in Virginia of "neglect of duty" nor have any Virginia cases defined the phrase as it pertains to the removal statute. Guidance can be drawn from other jurisdictions including the Federal and State levels which define "neglect of duty" in connection with the removal of public officers from office. All of them send a clear message that, in the context of the removal of public officials, particularly those that are elected, the neglect must indeed be serious.

In State v. Price (In re. Pawnee Cnty. Grand Jury) 212 Ok. 51, 280 P.3d 943 (Okla. 2012), the Oklahoma Supreme Court was reviewing a case in which a lower court had removed a sheriff from office pursuant to a state statute that listed willful "neglect of duty" as a cause. The court noted that the term "neglect of duty" was not defined by statute or through court decisions. However, it looked to the Oklahoma Uniform Jury Instructions, specifically the instruction in connection with the removal of public officers for habitual or willful neglect of duty with approval noting that "the uniform instruction defines it as the failure to act with a bad or evil purpose or deliberately act contrary to a known duty. The instruction also notes that mere thoughtless acts, with no bad or evil purpose, in which there is no excusable carelessness or recklessness on the part of the officer do not justify removal from office." Price, 280 P.3d. at 950.

In review of a proceeding that removed a sheriff from office, the Kentucky Court of Appeals defined neglect of duty "for removal of officers. . . as careless or intentional failure to exercise due diligence in performance of official duty, degree of care depending on character of duty, and including therefor willful neglect, and such forms of misfeasance and malfeasance as involve a failure in performance of duties required by law." Holliday v. Fields, Governor, 210 Ky. 179, 275 S.W. 642 (KY, 1925)

In Hansen v. Donna Lane Motor Ship Corp., 299 F. 977 (1924) the court held that neglect of duty implies continued neglect, not a single act of neglect.

In People v. McCaughan 49 Cal.2d 409, 317 P.2d 974 (1957) the California Supreme Court noted that "neglect of duty" means an intentional or grossly negligent failure to exercise due diligence in the performance of a known duty.

Finally, in Arizona Indep. Redistricting Comm'n v. Brewer, 229 Ariz. 347, 275 P.3d 1267 (Ariz. 2012), the Arizona Supreme Court analyzed a statute which authorized the governor to remove members of an industrial commission for "inefficiency, neglect of duty, misfeasance, malfeasance, or nonfeasance." The court stated that nonfeasance and neglect of duty are the same thing and that nonfeasance was a substantial failure by an officer to perform his duty. (Emphasis added.)

In strictly construing the Virginia removal statute, Bailey's actions in this particular case fall short of the "neglect of duty" requirement. The powers and duties of the board of supervisors are fixed by statute, and it has no other powers than those conferred, expressly or by necessary implication. There has not been any indication that Bailey has failed to perform any of his statutory duties as a member of the board of supervisors. Bailey has attended all but one of the board's meetings since he assumed office. He has fulfilled his obligation to vote on all issues before the board (he missed one vote for adjournment), he has fulfilled his commitment to represent the Board on all Board of Supervisors' Committees in which he was appointed, and his voting has been consistent throughout his tenure.

(B) **Misuse of Office**

"Misuse of office" is not defined in Virginia by statute or through case law. However, every other jurisdiction in which the term "misuse of office" or the similar term "misuse of public position" is used, there is a basic principle that some benefit was derived from the officials actions. In fact, the State of Florida has codified the definition which is consistent with the other jurisdiction's interpretation of the phrase. Section 112.313 (6) of the Florida Statutes in effect, defines misuse of office:

Misuse of Public Position-No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit or exemption for himself or others.

All federal cases dealing with misuse of office involve allegations of bribery or the selling of the office. For example, in U.S. v. Ellis, 91 F.3d 135 (4th Cir. 1996), a West Virginia legislator took \$10,000 to influence legislation involving gambling. The court noted that it must be proved "that a public official has obtained a payment to which he is not entitled, knowing that the payment was in return for official acts."

In Commissioner of Ethics v. Sullivan, 430 So.2d 928 (Dist Ct. of Appeal of Fla. 1983), "[t]he prohibition against misuse of public office sweeps widely.

Generally, it encompasses any misuse of office by a public officer or employee to 'secure a special privilege, benefit, or exemption for himself or others.'

"It is the use of the power of the public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense ." U.S. v. Trotta, 525 F.2d 1096, 1101 (C.A.2 (N.Y.), 1975)

In U.S. v. Thompson, 484 F.3d 877, (7th Cir., 2007) the Seventh Circuit Court of Appeals reversed the criminal conviction of a supervisor in Wisconsin's Bureau of Procurement who had departed from administrative rules to steer a contract to a particular offeror for political reasons. The court said that "[m]isuse of office (more broadly misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty.. from federal crimes". Thompson, 484 F.3d at 882, citing United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).

The view that "misuse of office" contemplates serious misconduct, not mistake or bad judgment, whereby a public office is used for some personal gain or advantage is consistent with the state cases reviewed. For example, in State Com'n on Ethics v. Sullivan, 430 So.2d 928 (Fla. App. 1 Dist, 1983), the Court of Appeals noted that Florida's legislatively mandated Code of Ethics "encompasses any misuse of office by a public officer or employee 'to secure a special privilege, benefit, or exemption for himself or others.'" Sullivan at 934. See also U.S. v. Paschall, 772 F.2d 68, 74 (4th Cir. 1985) ("A public official's retention of things of value paid to him by private persons for performance of his official duty is a misuse of office.")

In the present case, there has not been any evidence to indicate that Bailey's conduct would fall within, or anywhere close to, the definition of "misuse of office" as contemplated in the removal statute. Clearly Bailey should not have sent the inappropriate emails. However, he sent them from his private computer to either other private email addresses, or government issued email addresses. The government email addresses are accessible to the public. Bailey did not "misuse" his office to obtain any information that would not otherwise be available to him as a private citizen. There has not been any evidence uncovered that would suggest that Bailey used his position as a member of the Isle of Wight County Board of Supervisors to gain any type of advantage for himself or any other segment of the population. In fact, there has not been any evidence that he gained any benefit whatsoever in the dissemination of the emails or the comment made at the board meeting.

(C) **Incompetence in the performance of his duties.**

There is no legal definition of general “incompetence” in the context of the removal of a public officer in Virginia. However, it is well established that, “[w]hen, as here, a statute contains no express definition of a term, the general rule of statutory construction is to infer the legislature’s intent from the plain meaning of the language used,” in light of the context in which the term at issue is used.” Schwartz v. Commonwealth, 611 S.E.2d 631, 640, 45 Va. App. 407 (Va, 2005) (citations omitted)

The Code of Federal regulations defines incompetence as “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof”. 46 CFR 5.31 (Code of Federal Regulations (2012)).

Black’s Law Dictionary defines incompetency as the “lack of ability, legal qualification, or fitness to discharge the required duty. Black’s Law Dictionary, Revised Fourth Addition (1968)

Florida courts have examined the term in connection with the removal of teachers and have opined that it is “the inability or lack of fitness to discharge [one]’s required duties as a result of inefficiency.” And inefficiency is the repeated failure to perform duties prescribed by law. Schrimsher v. School Bd. of Palm Beach County, 694 So.2d 856 (Fla.App. 4 Dist., 1997)

In Ketchersid v. Rhea County Bd. Of Educ., 174 S.W.3d 163 (TN, 2005), the Tennessee Supreme Court affirmed a decision below that upheld the firing of a tenured teacher for, among other things, “incompetence.” The court cited a Tennessee statutory definition of the term: “‘Incompetence’ means being incapable, lacking adequate power, capacity or ability to carry out the duties and responsibility of the position.” Ketchersid, at 166 (citing Tenn Code Ann. § 49-5-501.)

Bailey’s behavior, as of this date, does not meet the threshold requirement set forth in the statute for “incompetence in the performance of his duties”. Although his behavior may have demonstrated poor judgment, Bailey has not shown any inability to perform his duties as a member of the Isle of Wight County Board of Supervisors. There is no evidence that Bailey’s ability to impartially carry on any county business is crippled.

(2) **Material Adverse Effect Upon the Conduct of the office.**

The second prong of the test will now be addressed, even though it is not legally necessary since Bailey's actions did not meet any of first three requirements of the statute.

As with every other element of the removal statute "material adverse effect" is not defined in Virginia. However, it is a term that is commonly used in contract law. It is routinely injected into a contract to allow either party to abandon the contract should a significant change occur. Normally the contract itself will define the meaning so that the parties have a meeting of the minds. A generic definition would be "any ... effect that, individually or in the aggregate, is materially adverse to the financial condition, business or results of operations of [the business] taken as a whole." Interim Healthcare, Inc. v. Spherion Corporation, C.A. No. 00C-09-180 (JRS) (consolidated) (Del. Super 11/21/2003) (Del. Super, 2003) or "any . . . change that . . . would reasonably be expected to have, individually or in the aggregate, a material adverse effect on or change in the financial condition, liabilities, business or results of operations of the [the business] taken as a whole." TransDigm Inc. v. Alcoa Global Fasteners, Inc. (Del. Ch., 2013)

California defines the phrase by statute. "Material adverse effect means a harm or injury that is measurable or demonstrable, or the reasonable likelihood of such harm or injury. In either case the harm or injury must be due to any policy, decision, action, condition or omission by the department or its staff." Cal. Code Regs. title 15, § 3084(c).

It is clear through the interviews conducted in this case, that Bailey's actions have divided Isle of Wight County and have caused a distraction for the County and its employees. Notwithstanding the increased bickering and delay in board proceedings, there has not been any indication that Bailey's actions have materially or adversely affected the business that the board of supervisors is required to perform.

The board of supervisors can only act through their vote. The facts, as they have been presented to date, do not meet the statutory requirement to satisfy second prong of the test, even if the first prong had been met. Bailey's behavior has not had a material adverse effect on the conduct of the board of supervisors for Isle of Wight County.

III. ADDITIONAL ANALYSIS:

Although Bailey's actions clearly do not meet the threshold standard required by the removal statute, it is critically important to consider the First Amendment implications in this case. One could argue that, as distasteful as it may seem to some people, most of the controversial emails were suggesting Bailey's political perspective. If that is the case, public officials are given the same rights to free speech under the United States Constitution that private citizens would otherwise be afforded when they comment on matters of "public interest". Pickering v. Board of Ed. of Township High School District, 391 U.S. 563 (1968) In Pickering the United States Supreme Court found that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Id. 391 U.S. at 574.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U. S. 564, 573 (2002) (internal quotation marks omitted).

Additionally, in Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), the United States Supreme Court held that a legislator's rights of free expression were violated under the First Amendment to the Constitution when the Georgia House of Representatives excluded Bond, a duly elected Representative, from membership because of his statements criticizing the policy of the Federal Government in Vietnam and the operation of the Selective Service laws. It was held that the State was not constitutionally justified in demanding a higher standard of loyalty from its legislators than from its private citizens. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." Id. 385 U.S. at 135-137.

IV. CONCLUSION

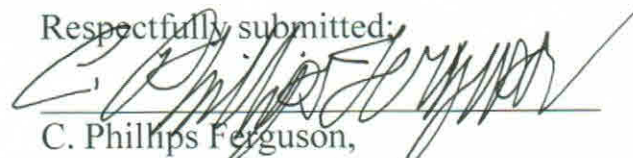
At this time, after a thorough review of the facts of this case and the applicable law, this case simply does not meet the removal requirements under Virginia Code Section 24.2-233. That is not to say that Bailey's actions are being condoned. It is quite understandable why the petitioners filed this action and felt that Bailey should be removed from office. County officials and other citizens variously referred to Bailey's conduct as being "unprofessional", "insensitive" "offensive", "inappropriate", "political", "egregious", "disenfranchising", and "hurtful". Bailey himself called his actions "hurtful". That being said, it is still insufficient to meet the statutory requirements for removal of an elected official from office. Because the statute must be strictly construed, the Commonwealth is restricted by the limitations set forth in the language of the statute, and thus can only apply the facts and evidence as they are presented to us at this time, and we are bound to follow the law. Thus, the Commonwealth will ask the Court to nonsuit this matter.

In the event that additional facts or information are obtained in this case the Suffolk Commonwealth's Attorney's Office will be available to review that information and determine whether further proceedings are appropriate.

We close by stating the following:

The position of supervisor belongs to the people of Isle of Wight County. At this point Mr. Bailey must decide whether he can continue to effectively represent the citizens of Isle of Wight County or whether the citizens would be better served by his stepping down. Should Mr. Bailey decide voluntarily to step down it would be a prudent and statesmanlike decision and show that he is acting in the best interests of the people of Isle of Wight County.

Respectfully submitted:



C. Phillips Ferguson,
Commonwealth's Attorney



Susan Walton
Assistant Commonwealth's Attorney